

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1006-FT

Cir. Ct. No. 1998FA198

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

DONALD W. RICE,

PETITIONER-RESPONDENT,

V.

**AMY JEAN WAGNER, F/K/A AMY JEAN RICE,
F/K/A AMY JEAN KNUTSON,**

RESPONDENT,

DUNN COUNTY CHILD SUPPORT AGENCY,

APPELLANT.

APPEAL from an order of the circuit court for Dunn County:
ROD W. SMELTZER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.¹

¶1 PER CURIAM. The Dunn County Child Support Agency appeals an order² amending a judgment pertaining to child support. The agency claims the circuit court's departure from the percentage standard to take into account certain work-related expenses was an erroneous exercise of discretion. We reject the argument and affirm.

¶2 Donald Rice is employed as a union laborer, earning \$27.58 per hour at job locations in the Minneapolis/St.Paul area, approximately 240 miles round trip from Rice's home in Mondovi. The union rates for commercial construction are significantly greater in the Minneapolis/St. Paul area. Including unemployment compensation from seasonal layoffs, Rice had a gross income of \$44,202.71 for 2005.

¶3 At the time of their divorce, the parties had a shared physical placement arrangement and Rice was ordered to pay \$75 weekly in child support. However, the shared placement arrangements were not followed, and Rice's ex-wife Amy Jean Wagner eventually requested the child support agency review the child support order. The child support agency subsequently filed a motion on December 16, 2004, to modify child support.

¶4 At the motion hearing conducted on January 24, 2006, the child support agency asked the court to establish child support in the amount of \$626

¹ This is an expedited appeal under WIS. STAT. Rule 809.17. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² The Dunn County Child Support Agency appeals a document entitled "Order Amending Judgment" filed January 27, 2006, and we refer to the document as an order.

per month, retroactive to January 1, 2005, a figure calculated as 17% of Rice's monthly gross income. Rice asked the court to set his child support obligation at \$448.90 per month. He requested an adjustment of his income to take into account certain work-related expenses. Specifically, he asked that his union dues of \$88.42 per month, safety equipment and tool costs of \$86.83 per month, and vehicle expenses of \$867.75 per month be subtracted from his gross income before child support was calculated. In its oral decision, the court set the revised child support at \$550 per month, retroactive to January 1, 2005.

¶5 The child support agency argues on appeal that the circuit court was required to determine the proper amount of child support payments according to the straight percentage standards established by WIS. ADMIN. CODE § DWD 40.03(1)(b).³ The child support agency maintains that the court erred by deviating from the presumptive application of the percentage standards. We disagree.

¶6 The determination of child support is committed to the sound discretion of the circuit court. *Luciani v. Montemurro-Luciani*, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996). An appellate court will sustain a discretionary act if it concludes that the circuit court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Id.* Findings of fact will be upheld unless clearly erroneous. WIS. STAT. § 805.17(2). When reviewing findings of fact, we search the record for reasons to sustain the circuit court's discretionary decision. See *Steiner v. Steiner*, 2004 WI App 169, ¶18, 276 Wis. 2d 290, 687 N.W.2d 740.

³ Citations to the Administrative Code are to the December 2003 version.

¶7 Ordinarily, the “straight percentage” standard for child support is determined using WIS. ADMIN. CODE § DWD 40.03(1), which applies specific percentages to a parent’s monthly income according to the number of children, such as 17% for one child and 25% for two children. However, the percentage standard may be modified if it is demonstrated by the greater weight of the credible evidence that application of the percentage standards would be unfair to the children or either of the parties. *See* WIS. STAT. § 767.25(1m).

¶8 Here, Rice was the only witness who testified at the hearing. There was no contradictory evidence offered on the relevant facts. The court specifically found that driving from Mondovi to the Minneapolis/St. Paul area every day was out of the ordinary. The court explained how this translated to a higher expense for Rice, even referring to approximate gas prices existing at the time. The court went on to find that this type of travel was a reasonable decision on Rice’s part because of the higher wages in the Minneapolis/St. Paul area.

¶9 The court made findings of Rice’s ultimate gross income after considering the evidence of his expenses and the information upon which the expenses were based. Although the circuit court did not articulate the calculations utilized in setting the child support at \$550 per month, we conclude all the necessary findings are discernable from the record, including the court’s tacit finding that it would be unfair to Rice not to reduce his gross income by a portion of the expenses required to maintain a higher level of income than available closer to his home.

¶10 In reviewing discretionary decisions, our task is to determine whether a court could reasonably come to the conclusion it reached. A reasonable judge could reach the conclusion that traveling 240 miles per day for significantly

higher wages was appropriate. The record also supports the implicit conclusion that it would be unfair not to deviate from the percentage standard to take into account a portion of the expenses associated with travel of this magnitude. The court did not render a blanket endorsement of all the expenses Rice requested. The record shows the court's decision was not an erroneous exercise of discretion.

¶11 Alternatively, we conclude the court did not deviate from the presumptive standard because when determining the monthly income available for child support, WIS. ADMIN. CODE § DWD 40.03(1) specifically allows the court to modify the parent's annual income for business expenses prior to determining child support using the straight percentage standard. In determining income modified for business expenses, § DWD 40.03(2)(c) allows a court to reduce a parent's gross income by the business expenses that the court determines are reasonably necessary for the production of that income. Moreover, these expenses may differ from the determination of allowable business expenses for tax purposes. *See also* WIS. ADMIN. CODE § DWD 40.02(16) (defining "Income modified for business expenses").

¶12 We conclude there is an adequate basis in the record to support a determination that a portion of Rice's expenses were reasonably necessary for the production of the higher wages available in the Minneapolis/St. Paul area. The court did not erroneously exercise its discretion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

